2014 WL 1678653 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Frank S. HOWARD, Petitioner-Appellant,
v.
Barbara HOWARD, Respondent-Appellee.

No. 2013-P-1724.
April 11, 2014.

On Appeal from a Judgment of the Suffolk County Probate and Family Court

Brief of the Appellee, Barbara Howard

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***1** *STATEMENT OF ISSUES PRESENTED*

Whether the Suffolk Probate Court (hereinafter "the Court") correctly entered summary judgment on behalf of the Respondent Barbara Howard (hereinafter "Barbara"), where based on undisputed material facts there was no evidence of financial exploitation by Barbara of her mother as alleged by the Petitioner, Frank Howard (hereinafter "Frank") ?

Whether Barbara had a burden to show that she had not engaged in any self-dealing as a fiduciary for her mother; and if so, did she meet that burden?

Whether the Court correctly denied Frank's Motion to Release Medical Records due to Frank's failure to make a minimal, threshold showing that there was a factual basis to support his complaint, justice required that the court prevent undue burden or expense, annoyance, embarrassment or oppression of Barbara and her mother, the court's balancing of Barbara's mother's right to privacy in her medical records which is to be protected absent compelling circumstances, and Frank's failure to adhere to the Massachusetts Rules of Civil Procedure?

Whether the Appeals Court should sanction Frank for failure to follow rules of civil and appellate ***2** procedure and Probate Court rules, and whether the Appeals Court should award Barbara attorney fees because the appeal is frivolous?

STATEMENT OF CASE

Pursuant to Mass. R. App. P. 16(b), Barbara is dissatisfied with Frank's Statement of the Case and thus offers her own. Frank and Barbara are brother and sister and are children of Daphne Howard (hereinafter "Daphne"). Frank's attempt to obtain his mother's financial information, which she did not want to share with him, began much earlier than the instant Petition. In fact, this is the fifth attempt he has made to obtain such information.

Over nine years ago, in April of 2005, Frank took possession of funds owned by his mother and using a limited POA that did not afford him the right, placed the funds in a joint account with his mother. He then refused to return the funds to his mother until he received an accounting of what she had done with the proceeds of the sale of her home in Minnesota. An action was brought in Minnesota, and Frank's attorney (who by that time was holding the money) eventually was ordered to return the funds to his mother. The Minnesota court did not ***3** allow the discovery of Daphne's personal financial information as Frank had sought. Unfortunately, it took two years and several thousands of dollars to obtain that order. (R.A. 349, 350).

Just as the Minnesota Court was winding down, Frank made an **elder abuse** report to Springwell **Elder** Services in Massachusetts alleging that Barbara was financially **abusing** Daphne. After a full investigation, no financial **abuse** was found, but the investigator did initially find financial exploitation against Frank for holding onto his mother's money in Minnesota. (R.A. 108). When the Minnesota action and the report of financial **abuse** did not satisfy Frank's desire for information about his mother's personal finances, he began to bring actions in the Massachusetts courts. (R.A. 109).

In 2008, after filing a Petition for Guardianship in Norfolk County which was dismissed for lack of venue, Frank and his wife filed a Petition for Guardianship of Daphne Howard in Suffolk Probate Court. *In Re: Guardianship of Daphne Howard, Suffolk Probate and Family Court, Docket No.* 08P2275. (R.A. 8-13). They requested ***4** the Court to order a medical examination of Daphne. (R.A. 13).

On December 3, 2008, the Court denied the motion because Barbara presented it with a Power of Attorney and Health Care Proxy, and the Court found that the thrust of the dispute appeared to be the potential ward's competency in 2001 to execute a health care proxy or durable power, rather than her current status. The Court suggested the Petitioner could file a petition to determine the validity of the health care proxy under G.L. c. 201D. (Moriarty, J.). (R.A. 14).

Instead, Frank filed Petitioner's Verified Motion for Appointment of Temporary Conservator on January 15, 2009. (R.A. 20-22). This Petition was filed even though Daphne already had been approved for Medicaid, was in a nursing home, and thus had no funds to conserve. (R.A. 109). The court appointed a Guardian Ad Litem, Attorney James Sommer (hereinafter "GAL"), to investigate the allegations of financial **abuse**. The GAL found no financial **abuse**. (R.A. 33, page 7 of court transcript; R.A. 92)

***5** Nonetheless, Barbara's Motion to Quash a Subpoena served by Frank was denied, and the Court allowed the Petitioner to obtain Daphne Howard's private financial records at Citizens Bank records at his own cost. Those documents revealed that Daphne was in control of her own finances at least through 2004. (R.A. 38). Not satisfied with receipt of those documents, Frank served a Request for Production of Documents upon his sister that requested documents regarding not only Daphne's finances, but those of Barbara and her family. (R.A. 53-56).

Barbara filed both a Motion for Protective Order and a Motion for Summary Judgment. On November 30, 2009, the Court allowed Barbara's Motion for Summary Judgment, and the Petition for Conservatorship was dismissed. The court found given the dismissal, there was no need to act on the Motion for Protective Order. (R.A. 97-100).

On March 9, 2010, Frank filed the instant action, a Verified Petition under M.G.L. 201D (17) for (1) Removal of Respondent as Agent for Bad Faith Conduct; (2) Accounting of Funds by Respondent; (3) and Recovery of Funds from Respondent. (R.A. 419- ***6** 425). Barbara filed a Motion to Dismiss because the Petition was filed pursuant to a statute that involves an agent's action as a Health Care Proxy. The statute, G.L. c. 201D(17), has nothing to do with a person's actions under a Durable Power of Attorney. (R.A. 426-429). The Court denied the motion stating, "I treat the petition as the functional equivalent of a petition to remove agent under durable power as unsuitable." (R.A. 426).

Frank filed a Motion to Compel production of documents he had served on Barbara who objected to the production, and the Court limited the production to four of the eighteen requests made. (R.A. 451-453; 569). The Court also ordered depositions of the parties to be taken within 30 days, which did occur.

In addition, Frank filed a Motion to Release Limited Medical Records and a Motion for Release of Credit Card Statements. The Court denied both motions on 8/31/2011. (R.A. 681-685).

Frank then filed a Motion for Reconsideration (R.A. 686-690) and the Respondent filed an opposition. (R.A. 692-696). The Court denied the Motion for Reconsideration. (R.A. 771-772).

***7** Barbara filed a Motion for Summary Judgment (R.A. 717-735) and a Concise Statement of Facts and Law in Support of Motion for Summary Judgment in accordance with the rules. (R.A. 736-745). Frank filed an opposition, but failed to file a response to Respondent's Concise Statement in violation of Probate Court Rule 27C. Instead, the Petitioner merely regurgitated the allegations he made in his complaint. (R.A. 760-765). The Court allowed the Motion for Summary Judgment on October 17, 2011. Judgment in favor of Barbara was not docketed until August 21, 2013, but it was entered as of October 17, 2011 (R.A. 776). Frank filed his Notice of Appeal on September 4, 2013. (R.A. 777).

STATEMENT OF FACTS [1]

1. Daphne is the mother of four children, Frank, Barbara, Gloria (now deceased) and Katharine. (R.A. 101).

2. Daphne appointed her daughter Barbara as her attorney-in-fact under a durable power of attorney signed in November of 2001 and Barbara's husband Jonathan as the alternate. (R.A. 102, 116-177).

***8** 3. While the DPOA is dated November 11, 2001, the affidavit of the notary reflects it was actually signed on November 30, 2001. (R.A. 432, 504).

4. The Petitioner/Appellant is Daphne's son, Frank. (R.A. 101).

5. Daphne is presently 92 years old and resides at a continuing care facility in Dedham, Massachusetts. (R.A. 110, 618, 619).

6. Daphne is currently on Medicaid. (R.A. 110).

7. Daphne was able to participate in her own affairs through early 2007. (R.A. 376, 377).

8. In 2001, Daphne sold the property she owned in Minnesota and moved to Brookline, Massachusetts. The HUD statement dated August 31, 2001 reflects she netted $161,001.25 from the sale. (R.A. 101, 113, 114).

9. Between 2001 and 2004, Daphne lived an independent life, living on her own in an apartment, while spending the winter months with her daughter Katharine in Hawaii as she had in the past. (R.A. 102, 103 ¶ 4-9)

10. During that time period, Daphne traveled unaccompanied to Hawaii and Jamaica. (Id., ¶ 8).

***9** 11. Additionally, in 2003, Daphne participated in a competitive invitational Contract Bridge tournament. (R.A. 104, ¶ 12).

12. Daphne continued for the most part to handle her own finances through at least 2004, writing out and signing her own checks. (R.A. 102-103; 157-224)

13. Daphne previously had been a bank teller and a bank officer and subsequently worked at a brokerage house. She was well aware about planning for long time care, Medicaid planning, and was appropriately spending down her assets while still maintaining a lifestyle that allowed her to travel and do the things which she enjoyed doing. (R.A. 102).

14. Frank was aware before his mother left Minnesota that it was her intention to spend-down her money to become Medicaid eligible. (Supplemental App., pp. 3-5)

15. Frank saw his mother only on two occasions between the time she moved from Minnesota in 2001 and 2010. (Supplemental App., p. 5).

16. In early 2002, Daphne invited Frank and his entire family to Jamaica which included staying in an oceanfront staffed villa, with car and driver and ***10** food He accepted this gift from his mother. (R.A. 103, 325-327).

17. In April of 2002 Frank went into great detail in a letter to his mother regarding his daughter's choices for college and the relative cost. (R.A. 325-327)

18. In 2002, Frank came to Boston to take his mother's car for his own use. He testified, moreover, that his mother on her own drove the car from Everett to Brookline, thus she still was capable of driving in 2002. (R.A. 748-749).

19. Further during that visit Frank taught Daphne how to use the Internet and email. (R.A. 750, 751). [2]

20. In early 2005, Daphne Howard sought to retrieve funds from her brokerage account in Minnesota managed by Frank's friend, Timothy Clarkson. Rather ***11** than following her instructions, Mr. Clarkson sent Daphne's funds to Frank without Daphne's permission and contrary to her instruction. (R.A. 105-107, ¶¶ 16-25; 331-350).

21. Frank then used the check payable to “Daphne Howard” to open a new joint bank account with himself in his mother's absence, pursuant to a limited power of attorney executed in 1999 (R.A. 341) which was later revoked (R.A. 345). [3]

22. Frank refused to return Daphne's money to her until he received an accounting from her as to how she had spent the money she received from the sale of her home in 2001. (R.A. 347).

23. A case was brought in the Minnesota District Court (Fourth Judicial District County of Hennepin) which eventually issued an order on July 10, 2007, that the funds, along with accrued interest, be returned to Daphne. (R.A. 349-350).

24. During the course of that litigation, Frank attempted to discover what his mother had done with ***12** her money from the sale of her Minnesota property in 2001. This discovery was not allowed by the Minnesota court. (R.A. 347).

25. Daphne was approved for Medicaid in 2007. Daphne receives Medicaid, social security and a pension check. Her social security and pension monies are paid to the nursing home, other than $72.50 monthly which is retained in her personal needs account. (R.A. 109, ¶ 34; 110, ¶141).

26. In September of 2007, Daphne Howard moved to a long-term placement at Hebrew Rehabilitation, 1200 Centre Street, Roslindale, MA 02131. (R.A. 384).

27. In 2007, Frank filed a financial exploitation claim with Springwell Protective Service alleging that his sister Barbara had taken their mother's money. Springwell found no evidence of financial **abuse** by Barbara. (R.A. 108, ¶¶ 31).

28. The Court in this case appointed a GAL who found no evidence of financial exploitation by Barbara. (R.A. 513, lines 14-24; p. 514, lines 1-2).

29. The GAL noted that Springwell and Mass Health investigated the financial affairs of Daphne for the 3 to 5 years previous to long-term care admission and found no financial impropriety. (R.A. ***13** 514, lines 7-8, 9-24; R.A. 515, lines 1-24; R.A. 516, lines 1-9).

30. Furthermore, based on the checks and financial records produced by Citizens, Daphne for the most part was signing her own checks through mid-2004 (including checks to the Frank in 2003). (R.A. 512, lines 3-8; R.A. 157-246, 277-282).

31. By the time Daphne stopped signing her own checks, the average monthly combined balance in April of 2004, was $11,421.33. (R.A. 252).

32. Thus, by the time Barbara took control of her mother's finances, her mother, on her own had spent-down most of her money that she had received from the sale of her home in Minnesota. Id.

33. Additionally, Daphne's extensive travel and rent would have required substantial expenditures over the period in question. (R.A. 102, 103).

34. Frank testified that he believed he might have complained to his mother that she was “spending his inheritance” by giving unequal gifts to her children. (R.A. 752, 753).

35. Daphne had instructed Barbara not to share her private, financial information with Frank. (R.A. 624, I 10) .

*14 SUMMARY OF ARGUMENT

Frank has been on a relentless campaign since 2005 to obtain information and intrude into his mother's personal and financial decisions and has been raising allegations about his mother's duly appointed agent under a power of attorney. In the pending action, brought under an inappropriate statute, he has alleged that Barbara has mismanaged his mother's funds from 2001 through 2007 and seeks reimbursement by Barbara to his mother or the Commonwealth of Massachusetts, but he has failed to raise specific facts establishing a genuine, triable issue. In fact, in response to Barbara's Motion for Summary Judgment, he did not even file a response to her Concise Statement of Material Facts in violation of Probate Court Rule 27C (b)(5)(ii).

Neither his Verified Complaint, nor his Affidavit, states that it was made on personal knowledge, as required in a response to a motion for summary judgment. Of course, it would have been impossible for Frank to have any personal knowledge regarding his mother's actions between 2002 and 2010 because he never saw her. The only time he did see ***15** her in 2002, she was living independently and in charge of her own finances.

Barbara has presented evidence based on personal knowledge and documents that her mother was in charge of her own finances through 2004 at which time she only had a little over $11,000 in her checking account. Any money that Frank alleges "disappeared" was in fact spent by his mother as she chose. Since Frank failed to offer any evidence that would show that Barbara financially exploited her mother between 2001 and 2007, the Court's order on summary judgment should be affirmed. (See infra, pp. 20-26).

Frank makes the preposterous argument that the Court ruled that "Barbara could engage in self-dealing without satisfying her burden of proof that the transfers of money to herself or her sister were in the sole and best interest of Daphne." (Appellant's Brief, p. 14). The Court, of course made no such ruling. Based on the evidence before the Court, Barbara did not make any gifts to herself or her family while acting as a fiduciary between 2001 and 2004 because during that time Daphne was competent and in charge of her own finances. ***16** *Rempelakis v. Russell*, 65 Mass. App. Ct. 557, 567 (2006).

When Barbara began to assist her mother with her finances after 2004, Barbara followed the directive of her mother to continue to spend-down her money to ensure that her mother would be eligible for Medicaid when the time came to be placed in a nursing home. The Court also had evidence that all payments made to Barbara from Daphne's funds while Barbara was acting in a fiduciary capacity were consistent with Daphne's goals and directives to spend-down her money and not rely on her children. Those payments already had been scrutinized by both Mass Health and by the **elder** service agency to which Frank had reported his sister for financial exploitation. Since Barbara's actions were consistent with her mother's directives, there was no evidence of financial exploitation. *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 152 (1995). (See infra, pp. 27-34).

The Court correctly denied Frank's Motion to Release Daphne's Medical Records. In order to overturn this decision by the Court, the Appeals Court would have to find that the lower court **abused** ***17** her discretion and that her decision was "characterized by arbitrary determination, capricious disposition, whimsical thinking or idiosyncratic choice." *Greenleaf v. Massachusetts Bay Transportation Authority*, 22 Mass. App. Ct. 426 429 (1996). Here, the Court heard argument, prepared a five-page order, and then allowed yet another hearing on Frank's Motion for Reconsideration. The Court then prepared another two-page decision. The Court had been overseeing this case (and related earlier matters brought by Frank filed two years prior to the decision on the Motion for Reconsideration) and thus was in the best position to determine this discovery order.

Daphne was entitled to privacy in her medical records, and Frank's intrusion into that privacy could only be violated if there was sufficient evidence to show that Daphne was in some financial or medical danger, which was not the case. Moreover, there was no evidence (other than Frank's subjective conclusion that his mother was "never the same" after a stroke in 1999) that his mother was incompetent. The uncontroverted evidence was that Daphne was living on her own, managing her own ***18** affairs through 2004. After 2004, Barbara assisted her mother, although Daphne was still involved with her financial decisions.

Frank's attempt to fish for something helpful for his case could not be allowed. E.A. Miller, Inc. & another v. South Shore Bank, 405 Mass. 95, 100 (1989). Since Frank failed to make even a minimal showing warranting the requested discovery, this court must affirm the lower court's decision. Id.

Moreover, the Court correctly considered whether further discovery would expose both Daphne and Barbara to undue burden or expense, annoyance, embarrassment or oppression. Mass.R.Civ.P. 26(c). The Court had before it evidence that this attempt to interfere in his mother's personal and financial affairs had been going on since 2005, exposing both Daphne and Barbara to significant legal costs. All of Frank's previous attempts to gain information had failed, and Barbara's actions were affirmed by **elder** services, Mass Health and eventually the GAL appointed by this Court. Further discovery would only expose Barbara to further harassment and financial cost. Since there was sufficient evidence ***19** to show that the relentless efforts by Frank to obtain his mother's private, confidential medical and financial information was done to annoy, embarrass and oppress his mother and sister and expose his sister to greater expense, the Court could have been justified for denying further discovery on this ground alone.

For all of the above reasons, the denial of further discovery was warranted and must be affirmed by this Court. (*See infra*, pp. 34-43).

Finally, Barbara has made a request for sanctions for Frank's failure to abide by the Rules of the Probate Court, Civil and Appellate Procedure and because this appeal is frivolous. *(See infra, pp. 44-49).*

ARGUMENT

I. STANDARD OF REVIEW - SUMMARY JUDGMENT.

An appellate court will "uphold an order granting summary judgment if the judge ruled on undisputed material facts and [her] ruling was correct as a matter of law. While [it] examine[s] the record in its light most favorable to the non-moving party, "conclusory statements, general denials, and factual allegations not based on ***20** personal knowledge [are] insufficient to avoid summary judgment. If the opposing party fails properly to present specific facts establishing a genuine, triable issue, summary judgment should be granted." *O'Rourke v. Hunter,* 446 Mass. 814, 821 (2006). On appeal, an appellate court may consider any ground apparent on the record that supports the result reached in the lower court. *Gabbidon v. King,* 414 Mass. 685, 686 (1993).

II. THE PROBATE COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF BARBARA HOWARD WHERE BASED ON UNDISPUTED MATERIAL FACTS THERE WAS NO EVIDENCE OF FINANCIAL EXPLOITATION AS ALLEGED BY FRANK HOWARD.

In order to survive a motion for summary judgment, Frank was required to present specific facts establishing a genuine, triable issue. He could not rely on his conclusions and factual allegations not based on his own personal knowledge. *O'Rourke v. Hunter,* 446 Mass. at 821. Frank's opposition to the motion for summary judgment failed to include a response to Barbara's Concise Statement of Material Fact, in violation of Probate Court Rule 27C (b)(5)(ii). In accordance with this Rule, Frank's failure in include this document in and of itself deems Barbara's Affidavits to be admitted ***21** (where "for purposes of summary judgment, the moving party's statement of a material fact shall be deemed to have been admitted unless controverted as set forth in this paragraph)." Id.

Frank admits that between 2001 when his mother left Minnesota and 2010, he only saw Daphne on two occasions, both in 2002. (Supplemental App., p.5). Thus, his affidavit is "largely unhelpful" in determining whether Daphne was competent at any time between 2001 when she left Minnesota and 2008 when he began making these allegations in the Massachusetts courts. *See O'Rourke v. Hunter,* 446 Mass. at 823 (where contestant in a will contest "lived in Pennsylvania and was unable to communicate easily with her mother by telephone because her mother had hearing difficulties" and thus her affidavit was "largely unhelpful)." *Id.*

Both of those occasions when Frank did see Daphne in 2002 occurred because his mother offered to give him something: first, a trip to Jamaica for himself and his family; and second, a car. On the first occasion, his mother flew herself to Jamaica. Frank sent his mother a detailed thank you note for the trip to Jamaica in which he goes into great ***22** detail (including a "cost comparison sheet") of his daughter's options for college. (R.A. 325-327). On the second occasion, he testified that his mother was still driving a car, made her way from Everett to Brookline on her own to pick up the car she gave him, and during the visit, he taught her how to use the internet. (R.A. 748-51). Also, Frank testified that at the time he visited his mother in Boston, Barbara was living in China so his mother was living completely on her own. (R.A. 751). Thus, based on Frank's own testimony, his observations of his mother in 2002 (the only times he saw her from 2001 through 2010) was that of a woman living independently, driving her own car, learning how to use the internet, and capable of reading complex letters from him.

While Frank's petition filed in this matter was "verified", it was not based on personal knowledge. (R.A. 419). When responding to summary judgment, Frank relied on an earlier filed affidavit that again was not based on personal knowledge. (R.A. 361).

"All affidavits or portions thereof made on information and belief as opposed to personal knowledge are to be disregarded in considering a ***23** motion for summary judgment," because they constitute hearsay." *Billings v. GTFM, LLC,* 449 Mass. 281, 295 (2007). Thus, Frank offered the court no specific material facts in opposition to Barbara's Motion for Summary Judgment.

As the Court noted, as long as Daphne Howard was competent, she was free to do with her money what she wanted despite her son's concern that she was spending his inheritance., As to his mother's competency, the most he can say is that in 1999, while living in Minnesota, Daphne Howard suffered a stroke. He concludes that she "was never the same mentally or behaviorally again." (R.A. 421). That conclusion, however, cannot be based on personal knowledge since he only saw her on two occasions after 2001. (Supplemental App., p. 5). Ironically, on both of those occasions which occurred in 2002, his mother was living on her own, driving a car, flying independently to Jamaica, and learning how to use the internet. (R.A. 102-103; 376-377, 748-751). *See O'Rourke v. Hunter,* 446 Mass. at 824 (where daughter's belief that "because [of] my mother's health problems [she was not] capable of indicating her wishes to a last will and testament" was ***24** "conclusory" and not sufficient to overcome a motion for summary judgment).

Perhaps the most important evidence of all regarding Daphne's competence from 2001 through at least 2004 are her own financial bank records which show that she, not Barbara, was in control of her finances through 2004. (R.A. 157-246, 277-282). By the time Barbara Howard began signing Daphne Howard's checks, the average monthly combined balance in April of 2004, was $11,421.33 (R.A. 252). Thus, there is documentary evidence that during the period of 2001 through 2004, Daphne was in charge of her own finances. By the time her daughter began assisting her, she had spent whatever money she had from the sale of the Minnesota property as she saw fit.

In addition to the documentary evidence, there is uncontroverted evidence based on personal knowledge from Barbara and Katharine Howard that from 2001 through 2004, Daphne was living on her own, traveling between Boston, Hawaii and Jamaica. Daphne participated in a competitive invitational contract bridge tournament in 2003. Even after 2004 when Daphne was having periods of forgetfulness, she ***25** was still very much able to participate in decisions regarding her financial situation and her living arrangements, which she continued to do through approximately early 2007. (R.A. 102-104, 377-378).

The Court also had before it additional uncontroverted evidence. Despite his limited knowledge regarding his mother's condition and finances, for the last nine years, Frank has made various allegations to anyone who would listen about his sister's alleged mishandling of his mother's funds. In Minnesota, however, he was ordered to return his mother's money, and he was not provided with the accounting of how his mother spent her money as he sought. (R.A. 347, 349-350).

The Court was aware that Frank also made a complaint to **elder** services who investigated Barbara's handling of her mother's funds. Springwell conducted an investigation and found no evidence of financial **abuse**. (R.A. 108). Frank then began to file actions in the Massachusetts Probate Court, this being the fourth case filed related to this same matter. (R.A. 8-14, 20-22, 109).

***26** The Court appointed a Guardian Ad Litem ("GAL") to review the allegations of financial exploitation. The GAL after reviewing the documentary evidence and interviewing the parties, Daphne's Medicaid attorney Donald Freedman, **elder abuse** investigators from Springwell Protective, social workers from the nursing home where Daphne resides, and Daphne's former landlord, he concluded there was no evidence of financial exploitation by Barbara. The GAL was satisfied after reviewing documentary evidence produced by Barbara that all expenditures (even those to Barbara's own family members) were made on behalf of Daphne. (R.A. 507-514). A GAL's report is ordinarily admissible and its use at trial should be anticipated. Guardianship of Pollard, 54 Mass.App.Ct. 318, 323 (2002).

"Mere suspicion, surmise or conjecture are not enough to warrant a finding" of financial exploitation as has been alleged here. *O'Rourke v. Hunter,* 446 Mass. at 828. Frank's unsupported allegations not based on personal knowledge cannot defeat a motion for summary judgment which is supported by documentary evidence and sworn testimony based on personal knowledge. The Court ***27** correctly entered summary judgment, and the Court's decision should be affirmed.

III. THE PROBATE COURT DID NOT RULE THAT BARBARA COULD ENGAGE IN SELF-DEALING.

Frank makes the preposterous argument that the Court ruled that "Barbara could engage in self-dealing without satisfying her burden of [proof] that the transfers of money to herself or her sister were in the sole and best interest of Daphne." (Appellant's Brief, p. 14). Of course, the Court made no such ruling. While it is true that a fiduciary who benefits from a transaction with the person for whom he is a fiduciary bears the burden of establishing that the transaction did not violate his obligations, a fiduciary who had no participation in the transaction has no such burden. *Rempelakis v. Russell*, 65 Mass. App. Ct. 557, 567 (2006). In this case, although Daphne appointed Barbara in 2001 as her agent, Barbara did not begin to assist Daphne in her financial transactions until 2004. (R.A. 102-103, 157-224). After that time, Barbara has presented evidence, which was supported by Springwell Protective Agency, Mass. Health and ***28** the GAL appointed in this case that she did not financially exploit her mother. (R.A. 513-516).

A. The undisputed evidence shows that Daphne was in charge of her own finances through 2004.

Daphne appointed her daughter, Barbara, to be her attorney in fact in November of 2001. (R.A. 23). The undisputed evidence, however, is that from that time until the end of 2004, Daphne lived independently (although spent time with her daughters in Hawaii (Katharine) and China (Barbara), was spending her own money, and writing her own checks. (R.A. 101-104, 157-323). The Appeals Court recognized, in somewhat narrowing the scope of *Cleary v. Cleary*, 427 Mass. 286, 290-291 (1998), cited by the Appellant, that "[f]iduciaries are often relatives or friends of the principal, and thus frequently are natural objects of the principal's bounty. Indeed, it is the principal's feelings for fiduciary that many times result both in the choice of that individual to perform fiduciary functions and the desire to reward the fiduciary in some manner. We think it a peculiar proposition that this natural state of affairs should be presumed in all instances to be the product of sinister behavior on the part of the fiduciary unless he proves otherwise. It ***29** is one thing to require such proof where the fiduciary himself brings about the benefit, even where the fiduciary is a relative or close friend of the principal. It is something else entirely to require it (and accordingly to require the fiduciary to prove a negative) where the fiduciary benefits from the principal's generosity without any role in the decision. We suspect that such a rule would result in the invalidation, or at least the complication, of legitimate conveyances far more often than it results in identifying conveyances that ought to be set aside." Rempelakis v. Russell, 65 Mass. App. Ct. at 566-567.

The uncontroverted evidence in this case is that up until 2004, Daphne was in charge of her own finances. That is supported not only by Barbara's affidavit but also by the checks Frank subpoenaed from the bank which show they are signed by Daphne for the most part through 2004. (R.A. 101-104, 157-323). By that time, Daphne had an average of $11,421.33 in her Citizens account, thus all money from the sale of her property had been spent. (R.A. 724-725). If Daphne chose to give any money to Barbara or her other children during that period of time, Barbara was not acting in a fiduciary role, and thus the Court did not ***30** overlook transfers "effectuated by Barbara herself after being given a Power of Attorney by Daphne in 2001." (Appellant's brief, p. 14).

B. After 2004, Barbara has presented evidence, which was reviewed by Springwell, Mass Health, and the GAL appointed in this case, showing that she did not financially exploit her mother.

In the Durable Power of Attorney signed by Daphne in 2001, she authorized Barbara to "take any actions which in her judgment are necessary or expedient in the management of my property and my personal affairs." (R.A. 23). "An agent is authorized to do, and to do only what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as [the agent] knows or should know them at the time he acts." *Gagnon v. Coombs*, 39 Mass.App.Ct. 144, 152 (1995). Thus, once Barbara began to assist her mother with her finances in 2004, Barbara was obligated to do that which she believed her mother wanted her to do given the information available to her at the time she was participating in each transaction.

The undisputed evidence is that through 2007, Daphne was still voicing her preferences regarding her own decisions. Daphne discussed her living situation ***31** with her daughters Barbara and Katharine in December of 2004. She said that she wanted to make a plan while she was still able to do so. Katharine invited her mother to live with her in Hawaii, but Daphne was

concerned about being a financial burden to her children. The services of an **elder** law attorney were retained, and Daphne was advised that, in giving up her apartment, she would be free to pay whoever she lived with $1,500 per month for "support". Daphne, comforted by the fact that she would not be a burden, said, "Great, let's do it." The amount of money was less than the monthly rent, including food payments she made when she was in her apartment. (R.A. 377-378). Thus, when she was living with Katharine, Barbara paid Katharine monthly support payments. When she was living with Barbara, Barbara made these payments to herself. [4]

Before her diagnosis of dementia, and prior to Barbara assisting her mother with her finances, Daphne "had begun "spending down" her money while still ***32** maintaining a lifestyle that allowed her to travel and do the things which she enjoyed doing." (R.A. 102). During that period of time, she continued to assist her daughter Katharine, a practice that dated back to when Daphne's husband was still alive. Daphne assisted her daughter in Colorado who at the time had multiple sclerosis. (R.A. 104). She made gifts to all her children (R.A. 157-323) and assisted Frank with a vacation to Jamaica with her and gave him (or sold him with a deferred payment which was never paid) a car. (R.A. 748-749).

Thus, the payments Barbara made to her sister (while her mother was living with her) and to herself (while Daphne was living with Barbara) were part of Daphne's goal of completing the spend down of her money (as advised by Attorney Freedman not accumulating the money she received each month) but giving her the advantage of living with her children and not going into a nursing home until she had to do so. These payments to Barbara were reviewed by Springwell, Mass Health and eventually the GAL appointed in the cases brought by Frank.

The GAL reviewed other payments Barbara made either to herself or her husband and found that these ***33** were all reimbursements that Barbara and her husband had paid out of their own pockets on behalf of Daphne and were simply being repaid. (R.A. 507, 508, 509, 513). Barbara provided the GAL with receipts for each one of those transactions and they were "explained to [him] in satisfactory detail." The GAL "didn't see anything that was there that appeared to be exploitation." (R.A. 513-514). The GAL spoke with Springwell and Daphne's **elder** law attorney, who provided him with documents "that appear[ed] to be quite reasonable as far as the spend-down. Back then, in 2007, it was the new law so it was pretty restricted as far as what the spend-down was from his perspective." Id. at 514. Mass Health also looked at those same payments and approved Daphne's Medicaid application. Id.

To the extent that Barbara would have the burden of proof under *Cleary*, she met that burden of showing that all of her actions which in any way benefited herself (rent and reimbursement of expenses) were done with strict adherence to the direction given to her by her mother when her mother was competent to give those directions. *Cleary v. Cleary*, 427 Mass. 286 at 290. Barbara's actions are completely opposite of the ***34** actions of the defendant in the Gagnon case, cited by the Appellant, whose actions contradicted what her father wanted to do. *Gagnon v. Coombs*, 39 Mass. App. Ct. at 152. Here, Barbara's actions were consistent with Daphne's wish that she spend down her money to qualify for Medicaid, live with her two daughters for as long as she could, and while living with her two daughters not be a financial burden on them. [5] Based on the undisputed facts upon which the court relied, the Court correctly entered summary judgment on behalf of Barbara.

IV. THE PROBATE COURT CORRECTLY DENIED FRANK'S MOTION TO RELEASE MEDICAL RECORDS DUE TO FRANK'S FAILURE TO MAKE A MINIMAL, THRESHOLD SHOWING THAT THERE WAS A FACTUAL BASIS TO SUPPORT HIS COMPLAINT; JUSTICE REQUIRED THAT THE COURT PREVENT UNDUE BURDEN OR EXPENSE, ANNOYANCE, EMBARRASSMENT OR OPPRESSION. TO DAPHNE AND BARBARA HOWARD; AND THE COURT PROPERLY BALANCED DAPHNE'S RIGHT TO PRIVACY IN HER MEDICAL RECORDS WHICH IS TO BE PROTECTED ABSENT COMPELLING CIRCUMSTANCES.

***35** The Court correctly denied Petitioner's Motion to Release Daphne's Medical Records and Credit Card Statements because the Petitioner had failed to make a minimal, threshold showing that there was a factual basis to support his complaint. The Court also took into consideration the Massachusetts Rules of Civil Procedure which allow a court "to limit discovery to prevent

undue burden or expense, annoyance, embarrassment or oppression" and when "justice [so] requires". Mass. R. Civ. P. 26(c). Labbe v. Home Depot USA, Inc. 22 Mass. L. Rep 310, 10-11 (Mass Super Ct. 2007). (R.A. 683). The Court also balanced Daphne's right to privacy in her medical records which is to be protected absent compelling circumstances against Frank's desire for her private medical information.

A. Standard of Review of Discovery Orders

The standard of review of a trial judge's discovery order is **abuse** of discretion. Appellate courts will not interfere with the judge's exercise of discretion in the absence of a showing of prejudicial error resulting from an **abuse** of discretion. *Solimene v. B. Grauel & Co., KG,* 399 Mass 790, 799 (1987). The appellate courts "do not consider that discretion ***36** **abused** unless its exercise has been characterized by arbitrary determination, capricious disposition, whimsical thinking, or idiosyncratic choice." *Greenleaf v. Massachusetts Bay Transportation Authority,* 22 Mass. App. Ct. 426, 429 (1986) and cases cited. The scope and timing of discovery is within the trial judge's discretion and the "prevention of [discovery] **abuse** is sufficient justification for the authorization of protective orders. With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." *Cronin v. Strayer,* 392 Mass. 525, 536 (1984).

Here, the Court thoroughly reviewed the file, heard argument and prepared a five-page order outlining the Court's reasons for her decision. (R.A. 681-685). In addition, Frank immediately filed a Motion for Reconsideration. The Court held a subsequent hearing (R.A. 697-716), and issued another two-page order outlining her reasoned approach to her decision. (R.A. 771-772). The parties were before this same court on multiple occasions. The Court had allowed limited discovery and appointed a GAL to investigate the matter. The Court's reasoned decision ***37** was anything but arbitrary, capricious, whimsical, or idiosyncratic choice, and must be affirmed by this Court. *Id.*

B. Frank was not entitled to his mother's medical records because he failed to make a minimal showing warranting the requested discovery.

"Litigants may be denied an opportunity for discovery if their complaints and affidavits have "not made even a minimal showing warranting the requested discovery." *E.A. Miller, Inc. & another v. South Shore Bank,* 405 Mass. 95, 100 (1989). "Having failed to make a minimal, threshold showing that there is a factual basis to support their complaint, litigants are not entitled to discovery prior to disposition of a motion for summary judgment." *Id.* In the *Miller* case, the Plaintiff made the same argument that Frank essentially is making here; that absent the requested discovery, he was unable to oppose summary judgment. The *Miller* court made clear that a "court may grant summary judgment despite an opposing party's claim that discovery would yield additional facts where the opposing party has not alleged specific facts that could be developed though such discovery." *Id.* at 102. Just as the Plaintiff in the Miller case, Frank ***38** "lacked a minimal basis in fact for his allegations before he sought discovery." *Id.*

In making her decision, the Court relied on Frank's own observation of his mother and his own conduct in interacting with her on the two occasions he saw her in 2002. "Parties may not "fish" for evidence on which to base their complaint "in hopes of somehow finding something helpful to [their] case in the course of discovery procedure." Id. Just as in the Miller case, Frank's allegations and affidavits (not made of personal knowledge and conclusory in nature), even when read in the light most favorable to him "do not give rise to a genuine issue of material fact." Frank's affidavit, which stated that his mother suffered a mini stroke in 1999, even if true, does not give rise to a genuine issue of material fact as to whether his mother was competent between 2001 and 2007, the relative timeframe. His conclusion that "she was never the same" is just that, a subjective conclusion upon which the court cannot rely.

The uncontroverted evidence (even that coming from Frank himself) attests to the fact that Daphne was living on her own, traveling independently, driving a car, learning to use the Internet, and ***39** maintaining her own finances through at least 2004.[6] The investigations by Mass Health, Springwell, and the GAL appointed by the Probate Court at the Commonwealth's expense all showed no evidence of financial exploitation. Since Frank's affidavits (not based on personal knowledge) and

allegations even when read in the light most favorable to him, do not give rise to a genuine issue of material fact, it was not an error for the Court to deny further intrusion into Daphne's private health information.

C. Continued discovery in this matter would have exposed Daphne and Barbara to further annoyance, embarrassment, oppression and undue burden or expense.

In denying the Petitioner's request for further private medical records belonging to his mother, the Court followed the dictates of Massachusetts Rules of Civil Procedure 26 (c) to limit discovery "to prevent undue burden or expense, annoyance, embarrassment or ***40** oppression when justice requires.[7] (R.A. 683). In doing so, the Court noted that Frank's attempt to receive this private information about his mother had been ongoing since 2005, beginning in the Minnesotaaction which denied providing him with the discovery. The Court then noted in 2007, Frank had filed a financial exploitation claim with Springwell Protective Service alleging that Respondent had taken their mother's money, and no evidence of financial **abuse** was found. (R.A. 682). The Court then noted the several actions he had taken to get control over his mother's medical and financial information through three previously filed actions in the Massachusetts Probate Courts. (R.A. 683). The Court noted that the GAL she appointed (at the Commonwealth's expense) found no evidence of financial exploitation. (R.A. ***41** 683). The Court also noted that Daphne had been approved for Medicaid in 2007. Thus, another investigation was done into Daphne's finances.

As was noted later in Barbara's Motion for Summary Judgment and Motion for Attorney Fees, as Frank knew and acknowledged in the filing of this and other petitions, even if additional funds were discovered, "such funds would be required to be spent down to continue her Medicaid qualification." (R.A. 684). The Commonwealth of Massachusetts, who already approved her Medicaid application, would be the only recipient of any additional funds, and it already reviewed Daphne's finances for the appropriate time period and approved the application. Frank's Petition never was going to bring any relief to Daphne, making Frank's motives in bringing these repetitive Petitions suspect. The prolonged litigation, however, was going to cost his sister thousands of dollars in attorney fees defending these baseless accusations.[8] While the court did not make a particular finding on this issue, there is sufficient evidence to show that the ***42** relentless desire of Frank to obtain his mother's private, confidential medical and financial information was done to annoy, embarrass and oppress his mother and sister and expose his sister to greater expense.[9] Justice required that Frank's harassment of his mother and sister be stopped, and that is yet another reason the Court's order denying further discovery should be affirmed.

D. The Court correctly balanced Daphne's right to privacy in her medical records with Frank's desire for her private medical information.

Both Federal law pursuant to the Privacy Rule standards under the Health Insurance Portability and Accountability Act of 1996 ("HIPPAA") and Massachusetts statutes recognize a patient's right of privacy to her confidential medical information. G.L. c 111, §70 and 70E and G.L. 214, § 1B. The Supreme Judicial Court has recognized "a patient's valid interest in preserving the confidentiality of medical facts relayed to a physician. A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment ***43** without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled." *Bratt v. International Business Machines Corp.,* 382 Mass. 508, 522-523 (1984) and cases cited.

Here, the court balanced Daphne's right to privacy against her son's desire to obtain both her medical and financial information (which in the past he admittedly chastised his mother for inappropriately "spending [his] inheritance"). Daphne is in no financial or medical danger. Her needs are appropriately being met at a nursing home. She appropriately "spent-down" her assets qualifying her for Mass Health. The Commonwealth of Massachusetts in approving her Medicaid benefits did a thorough investigation of her spending during the five previous years to the approval of her application in 2007. Based on a record showing an independent woman making decisions about her own life and finances between 2001 and 2007, the Court appropriately protected Daphne personal, private medical information from her son's further relentless invasion into her privacy.

***44 REQUEST FOR SANCTIONS**

As Frank had done in the lower court by failing to follow the Rules of Civil Procedure in noticing Keeper of the Record Depositions and subpoenaing records and failing to follow Probate Court Rules by not providing the Court with a response to Barbara's Concise Statement of Facts and Law (Probate Court Rule 27C), here, Frank has failed to follow Mass.R.App.P. 16(a)(3) and (e) by failing to include a Statement of Fact section with appropriate references to the record and by making statements of "fact" in the brief without appropriate and accurate references to the record.

The following are just a few of the more blatant examples of "statements of fact" not supported by the record.

> In 1999, Daphne's first signs of dementia appeared and by 2001, *the disease had progressed to the point where she could no longer remain in her home."* A. 1-362. (Appellant's Brief, p. 2, n. 3).

Frank's Affidavit (not based on personal knowledge) never states that Daphne could no longer remain in her home. In fact, she lived ***45** independently through 2004 and was in charge of her own finances. (R.A. 102-104, 157-323).

The next sentence in the same footnote is completely devoid of record support. (Appellant's brief, p. 2, n. 3).

Without record support, Frank states,

> Frank's wishful thinking, as he attempted to reteach Daphne how to use the internet, is not evidence that Daphne was competent, *especially taking into consideration the fact that she was never able to use the internet and Frank's lessons turned out to be a waste of time.* Appellant's Brief, p. 9, n. 10.

Again, there is no reference to this "fact". What is factual is that after the visit where Frank taught his mother to use the Internet, he did not see her again for eight years, thus, he was in no position to observe what abilities she had vis a vis the internet. (Supplemental App., p. 5).

There is no record support for Frank's statement that during the time period between September 2001 and April 22, 2002, an additional $90,000 of Daphne's funds vanished. (Appellant's ***46** Brief, Footnote 15, on page 16). It should be noted again that this was a period of time when Daphne was in charge of her own finances.

Appellant's brief at page 17 cites Record Appendix 367, which is a page from Frank's affidavit which was not based on personal knowledge. The cited document was not included by Frank in the Record Appendix.

Appellant's brief at page 17 states that Barbara isolated Daphne from Frank to the point where it became necessary for him to obtain a court order to have some access to her. The record appendix cited does not support an allegation of isolation. It shows an Agreement of the Parties that Frank would be allowed to visit his mother "if the caregivers deem appropriate." It also states Frank cannot remove her from the facility and/or floor." (R.A. 642). Although Frank alleged Barbara had prevented him from seeing his mother at the facility where she lives, the social worker signed an affidavit based on her own personal knowledge that "there is nothing in Daphne Howards's file, however, which indicates that Frank Howard cannot visit and/or contact Daphne Howard. There is a ***47** notation that no one other than Barbara Howard can remove Daphne Howard from the facility." (R.A. 619).

Frank argues in his brief that his sister "offered various false, conflicting, and misleading explanations regarding the missing proceeds from the sale of Daphne's Minnesota home." His citation for that "fact" is an unsupported argument in Frank's opposition to Barbara's Motion for Summary Judgment. (R.A 759). In fact, there is no support that any money was missing. Indeed, Barbara's various explanations for some of what her mother did with her own money were not conflicting or false. Her

mother spent some money on travel, she spent some money on attorney fees, some went to her disabled daughter Gloria, some went to Frank, and some was invested with Frank's friend, Timothy Clarkson who wrongfully gave Daphne's money to Frank. (R.A. 101-111, 113-323, 329, 333-336, 343, 349-350, 441-442, 507, 513, 515).

In addition to his failure to properly cite to the Record Appendix, "several of [Frank's] arguments are bald assertions of error, lacking legal argument and authority, and thus not advanced in a manner ***48** which rises to the level of appellate argument". *Zora v. State Ethics Commission,* 415 Mass. 640, n.3. Inappropriate argument and unsubstantiated statements in a brief may infect an otherwise meritorious appeal so pervasively as to make it frivolous..." *Avery v. Steele,* 414 Mass. 450, 456 (1993) and cases cited.

This Court has discretion to award counsel fees if the Court determines the appeal is "wholly insubstantial, frivolous, or not advanced in good faith pursuant to Mass.R.App.P. 25 and G.L. c. 211A, § 15. If this Court makes a discretionary finding that this appeal is wholly insubstantial, frivolous, or not advanced in good faith," pursuant to G.L. c. 231, § 6F, that statute mandates the award of reasonable counsel fees and other costs and expenses. *Masterpiece Kitchen & Bath, Inc. v. Peter Gordon & another,* 425 Mass. 325, 330 (1997).

The lower court found (and the Appellant did not appeal this order) that "by the time this complaint was filed Frank knew or should have known that there was no basis for asserting Mother's incompetency prior to 2007, given the decision of the Minnesota court, the GAL report, the Mass Health ***49** investigation, the Springwell investigation and given his own treatment of Mother as competent by his own interaction with her and acceptance of gifts." (Supplemental App., p. 9). This unchallenged finding by the Court confirms that Frank's filing of the action in Probate Court and his appeal here is wholly insubstantial, frivolous and not advanced in good faith." G.L. c. 231, § 6F.

The Appellee Barbara Howard, therefore, requests sanctions, including damages (attorney fees), double costs, pursuant to G.L. c. 211A, § 15 and Mass. R. App. P. 25, and G.L. c. 231, § 6F in addition to costs pursuant to Rule 26.

CONCLUSION

Since the lower court properly entered summary judgment pursuant to Mass. R. Civ. P. 56 in favor of the Respondent Barbara Howard, the judgment should be affirmed on the grounds relied upon by the Probate Court or on other grounds relied upon by this Court and supported by the record.

In addition, due to the Petitioner's failure to adhere to the Rules of this Court and the Probate Court and the fact that the lower court found the matter frivolous and that order was not appealed, ***50** this Court should find that the appeal is frivolous and award counsel fees to the Respondent Barbara Howard and impose double costs on the Appellant.

Footnotes

1 The Appellant failed to include a Statement of Fact section in his brief in violation of Mass. R. App. P. 16 (a) (3).

2 In Appellant's Brief, he states in a footnote that this fact should not have been taken into consideration by the court "especially taking into consideration the fact that she was never able to use the "nternet and Frank's lessons turned out to be a waste of time." There is no reference to the record appendix, and this "fact" contradicts what he said in his sworn testimony that "she could do it." (R.A. 751, lines 6-7). Nonetheless, Frank's ability to make this statement would have been impossible since he had not seen his mother after the visit in 2002 until 2010. (Supplemental App., p. 5).

3 The limited DPOA was restricted to transactions associated with a particular bank in Minnesota and was referred to as a "TCF POA" and allowed Frank as Attorney in Fact to have the same authority over a specified account at TCF as Daphne except that Frank could "not name himself as a joint account holder with me." (R.A. 341).

4 The purpose of these payments, along with making Daphne feel better about living with her daughters, was that the money she was saving by not paying rent would not accumulate, which would make her ineligible for Medicaid if she went over $2000 in assets. 130 CMR 520.003.

5 One of Frank's more ludicrous allegations is that Barbara should not have spent money on attorneys to retrieve Daphne's money he was holding hostage in Minnesota and would not release until he obtained information regarding his mother's finances. Barbara had an absolute obligation to "to collect any and all claims and demands of any nature and description which [Daphne had] against any person" pursuant to the POA. (R.A. 23).

6 It should be noted that Barbara, who is accused by her brother of financially **abusing** Daphne, was living in China during some of that time.

7 As has occurred throughout the several petitions Frank has filed, he has failed to follow Rules of Civil Procedure and Probate Court Rules. While the Court did not have before her a Motion for Protective Order, it was appropriate for her to take this into consideration. Frank failed to serve either a Notice of Deposition or any subpoenas prior to filing this Motion for Limited Records, even though he was requested to do so. Nothing in the Motion even alludes to what medical records he is seeking and from whom. His vague request for "limited" records over a period of seven years could have been denied solely for his failure to follow the requirements of Mass. R. Civ. P. 30 and 45. (R.A. 662-663).

8 The Court did eventually allow Barbara's Motion for Attorney Fees pursuant to G.L. c. 231, §6F on November 3, 2011, which ironically the Appellant did not raise as an issue in his brief. Thus, the order for payment of attorney fee stands. (Supplemental App., p. 6-11).

9 Frank's attorney admitted that his client was ghost writing some of the motions, thus keeping his costs down while his sister had to pay legal costs to defend the frivolous allegations. (R.A. 701, lines, 2-6, 19-21; R.A. 706, lines 13-23).

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